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IN THE

Supreme Court of the United States

October Term, 1964

No. 410.

MARY CUNLIFFE TRAUTWEIN, WILLIS HENDERSON, WILLIAM H. KISTINGER, FLOYD H. NORRIS, and JOSEPH C. HECTON,

Appellants,

vs.

THE COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES, CALIFORNIA,

Appellee.

On Appeal From the Supreme Court of the State of California.

REPLY TO MOTION TO DISMISS OR AFFIRM.

Opening Statement.

The Appellee's Motion to Dismiss or Affirm is confusing, and for that reason it is essential that certain facts be clarified. The Motion to Dismiss, creates the impression that the writer as one of the Appellant's received written notice of the hearing held by the Agency on March 21, 1956 and therefore has waived any

objection he might have to the defective publication of notice. At the trial and on appeal the admitted facts have been that Floyd H. Norris did not receive written notice and did not attend the public hearing before the Agency.

No issue was made as to whether the Agency mailed notice to the owners as shown on the County Tax Assessor's records. It is common knowledge that these records are incorrect in a great many instances and for that reason many taxpayers do not get their tax statements. No evidence was offered that a notice of the hearing held on March 21, 1956 was mailed to Floyd H. Norris because such was not the case. If the Appellee intended to leave the impression that the owner received notice then it is a false impression.

On page 12 of Appellee's Motion the following statement is made and we quote, "6. Both the Tentative Plan itself and the Agency's hearing thereon were unnecessary, repetitive and time consuming steps in the California Redevelopment Law, which could have been, and in 1959, were, eliminated entirely (see Statement of the case)." From this statement it would appear that the provisions requiring the Agency to conduct a public hearing and to give notice thereof by publication for four weeks has been repealed by the California Legislature. With this in mind let us examine the facts. We set forth in verbatim the law as it existed in 1956 and as it exists today.

In 1956 Sections 33530 and 33531 read as follows:

> "33530. Public Hearing. Before submitting the tentative plan to the legislative body the agency shall conduct a public hearing on it."

"33531. Publication of notice of hearing. The agency shall publish notice of the hearing not less than once a week for four successive weeks prior to the hearing. The notice shall be published in a newspaper of general circulation, printed and published in the community, or if there is none, in a newspaper selected by the agency."

While the entire Community Redevelopment Law was rewritten and renumbered in 1963 there is still a requirement for a public hearing by the agency on any redevelopment plan and a requirement for publication of notice for four weeks. These pertinent sections are as follows:

§33348. Public hearing by agency

Before the adoption of a redevelopment plan by the agency, the agency shall conduct a public hearing on it.

§33349. Notice of hearing; publication, contents; mailing

The agency shall publish notice of the hearing not less than once a week for four successive weeks prior to the hearing. The notice shall be published in a newspaper of general circulation, printed and published in the community, or if there is none, in a newspaper selected by the agency. The notice of hearing shall include a legal description of the boundaries of the area or areas designated in the proposed redevelopment plan and a general statement of the scope and objectives of the plan. Copies of the notices shall be mailed to the last known assessee of each parcel of land in the area designated in the redevelopment plan, at his last known

address as shown on the last equalized assessment roll of the county; or where a city assesses, levies, and collects its own taxes, as shown on the last equalized assessment roll of the city.

While it is true there is no requirement for a public hearing on the Tentative Plan there is still a requirement for a public hearing by the Agency and the publication of notice for four weeks prior thereto. Perhaps no one else was misled by Appellee's statements, but this writer was of the opinion that the requirement for a public hearing after publication of notice for four weeks had been eliminated until he checked the law.

Much the same situation exists with reference to the question of whether Appellants herein raised and preserved the federal question. On page 9 of Appellee's Motion we find the following:

> "Trautwein *did not* assert in its Opening Brief on appeal below that the alleged defect in publication violated any rights of Trautwein under the Fourteenth Amendment of the United States Constitution, and did not contend that §33959, as applied by the Trial Court was invalid under the United States Constitution." (Trautwein Opening Brief below, pp. 3-21). (Emphasis ours.)

Further on the same page it is stated:

> "Trautwein *did* assert in the opening brief that the alleged defect in publication deprived her of 'due process.' However, since the California Constitution also contains a due process clause (Calif. Const. Art. I, §13), this reference is presumed to refer to California law and the California Constitution." (Emphasis ours.)

In Appellant's Opening Brief the following language was used, on pages 8 and 9:

> "*Ellis v. Board of Supervisors*, 38 Cal. App. 480, deals with the formation of an irrigation district in San Diego County and there the court makes it clear that in order to satisfy the requirements of jurisdiction it is necessary that the statute provide for some kind of reasonable notice to persons legally interested in order to meet the requirements of due process of law as required by the XIV Amendment to the Constitution of the United States and Section 13, Article I of the California Constitution. The court further states that it is not within the power of the Legislature to destroy the effect of such an essential requirement by providing that a finding by a subordinate body that due notice has been given and shall be final and conclusive evidence thereof.
>
> "The writer submits that this decision is not authority for the proposition that the failure to publish the notice in the manner prescribed by the Legislature is not jurisdictional."

The above quotation from Appellant's Opening Brief makes it clear Appellants were not relying solely on the California Constitution and had no intent to rely upon the XIV Amendment to the Constitution of the United States, and Appellee's argument thereon must fail.

ARGUMENT.

A. Trautwein Failed Seasonably to Raise and Preserve the Federal Question Raised in the Trautwein Jurisdictional Statement.

From the facts set forth herein it seems very clear that Trautwein did properly and seasonably raise the jurisdictional question. See *Shelley v. Kraemer*, 334 U. S. 1, 14; *National Ass'n for A. of C. P. v. State of Alabama*, 357 U. S. 453, 454-455; *Braniff Airways v. Nebraska State Board*, 347 U. S. 590, 598-599.

Assuming for the purpose of argument that the necessary Federal Question had not been properly raised in the court below, nevertheless this point was passed upon by not only the trial court but the California District Court of Appeal and the California Supreme Court. In the opinion of the trial judge he used a portion of three pages (pages 30-32) in deciding upon the question of the Sufficiency of Publication. On page 4 of Appendix A the District Court of Appeal stated that the sufficiency of the publication of notice was an issue, but decided the case for Appellants on other grounds. The California Supreme Court used three pages to dispose of this argument (Appendix B, pp. 31-33) and in conclusion said, "No such deprivation of due process has occurred in the respect here considered."

In *Manhatten Life Insurance Co. v. Cohen*, 234 U. S. 123, 134 this court held that jurisdiction to review existed even though such rights had not been expressly asserted below and cited *Tilt v. Kelsey*, 207 U. S. 43, 51. They further stated, the right to review under such condition being in effect but a result of the elementary rule, it is irrelevant to inquire how and when a Federal ques-

tion was raised in a court below when it appears that such question was actually considered and decided. See also *Ralgy v. Ohio*, 360 U. S. 423, 430-437.

Appellee vigorously contends that Trautwein did not show that he had suffered any damage by reason of his failure to receive notice of the public hearing before the Agency on March 21, 1950 and therefore any right protected by the Constitution was waived. We submit that this whole argument was answered by the following statement found on page 20 of Appellant's Opening Brief:

> "In these cases the court points out that the State and Federal Constitutions provide that a person cannot be deprived of his property without due process of law.
>
> In *People v. Broad, supra*, the court uses the following languages at page 8:
>
> 'It is admitted by plaintiff that notice and an opportunity to be heard are necessary to constitute due process; but it is urged that, where the owner cannot possibly show facts that would relieve him from forfeiture, notice to him would be an idle act; that the person using the automobile is the only one in a position to make a defense and, consequently, notice to him with an opportunity to be heard was sufficient to meet the constitutional requirements.
>
> 'Whatever the effect of the criminal proceedings upon Broad's interest in the automobile (and this we do not decide), he was not appellant's agent for any purpose; and the sole question here is the sufficiency of the statute as against

the latter." As held in the cases above cited, the question of the sufficiency of the statute does not depend upon the notice or hearing actually afforded by the court (Stuart v. Palmer, supra), and it is no answer to one who protests against the taking of his property that in his particular case due process would have lead to the same result because he had no adequate defense on the merits (Rees v. Watertown, 19 Wall. 107, 123, 22 L. Ed. 72; Coe v. Armour Fertilizer Co., supra, page 424 of 237 U. S., 35 S. Ct. 625.)"

See also:

Jackson v. Denno (1964), 378 U. S. 368, 379-377.

By the argument of Appellee they would ingraft upon the well established law a provision that before anyone can appeal to this or the highest courts of his state, that his constitutional rights have been denied to him, he must first establish his innocence or that he has a good defense which would have resulted in a different decision. This same type of argument has been consistently rejected by this honorable court in such recent cases as *Jackson v. Denno* (1964), 378 U. S. 368, 378-381; *Massiah v. United States* (1964), 377 U. S. 201, 204; *Escobedo v. Illinois* (1964), 378 U. S. 478, 484-485. See also *Haynes v. Washington*, 373 U. S. 503, 515.

Appellee likewise contends that Appellants are estopped to claim the protection of due process as guaranteed by the XIV Amendment to the United States Constitution because they did not call attention to this defect at the hearings before the Agency and before

the City Council. The writer does not recall the time or incident when he first heard that there was a defective publication, but the facts are his first definite proof of that failure was when he read the Complaint filed by the Agency on December 28, 1959. The undisputed facts are that this information was in the exclusive possession of the Agency and not that of the Appellants. Yet by the arguments of Appellee the Appellants' property will be taken from them by eminent domain proceedings, because they were not aware of the deliberate acts of the Agency in violating the statutory requirements of publication of notice and additionally of going through the idle act of informing the Agency of this fact.

In this connection it is interesting to note the anomalous position of the Appellee. In the companion case of *Goldman v. The Community Redevelopment Agency* of the City of Los Angeles Appellee in its Opposition to Motion of *Amici Curiae* cites as Appendix A certain inconsistent statements of Mr. Clapp. It is significant to note that in their Motion to Dismiss or Affirm in this case they do not deny or even attempt to explain their earlier contentions that the publication of notice of which these Appellants complain were and are jurisdictional. It must then be accepted as an admitted fact that at the time of filing their action they did consider the requirement to publish notice as required by the statute as jurisdictional. But, when they find that this failure to publish notice in the manner required by law is an issue, they conveniently say that it is an "unnecessary, repetitive and time consuming steps in the California Redevelopment Law, which should have been, and in 1959, were, eliminated entirely." (See p. 12 of Appellee's Motion to Dismiss.)

Can it be said a Redevelopment Agency can do no wrong? Can a Redevelopment Agency ignore statutory requirements at will, and then take completely contradictory positions in the same lawsuit to suit its convenience? Can a Redevelopment Agency promulgate its own rules as to notice to property owners whose land it intends to take by eminent domain proceedings without violating the XIV Amendment to the United States Constitution? Can a validating act be used to waive jurisdictional requirements as required by Due Process?

B. No Important Question of Federal Law Is Involved.

Appellee makes the statement that Trautwein makes no attempt to show the questions raised in the Jurisdictional Statement are sufficient to warrant review by this court. While this court may find our arguments on pages 8 to 15 of the Jurisdictional Statement to be less than persuasive, it hardly seems fair to say that Trautwein made no attempt to show that the question is of sufficient importance to warrant review by this Court. Appellee further contends this is a narrow question and the statute has been repealed, so it is not one of general application and a review is not warranted.

With all the sincerity and force that is available the writer insists that if this appeal is denied this case will be frequently and authoritatively cited for the proposition that there is no mandatory requirement that the public be notified of hearings before the Agency on any Redevelopment Plan and this in total disregard of the statutory requirements.

Appellee ignores approximately eight pages of our Jurisdictional Statement as to why this Question is

Substantial, but more important they failed to point out where or when the Agency acquired jurisdiction in answer to our question at the top of page 14. It is submitted that their failure to attempt to answer this question is in effect an admission that there can be no other logical answer than the one given by Appellants. If this case is permitted to stand then for the first and only time that we can find a curative statute will have been held sufficient to waive the jurisdictional requirements of the XIV Amendment to the United States Constitution and similar provisions of the various state constitutions. This is a substantial question of great interest to all the people of the United States.

Respectfully submitted,

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FLOYD H. NORRIS,
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